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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

JEFFREY STOUTT,

Petitioner,

v.

STATE OF OREGON, ex rel
ADULT AND FAMILY SERVICES
DIVISION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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QUESTION PRESENTED

When the state chooses an adversary forum, and initiates and prosecutes a paternity action through a state or district attorney, does the failure to appoint counsel for an indigent defendant violate his due process rights guaranteed by the Fourteenth Amendment to the United States Constitution, when the trial court (a) fails to advise the indigent defendant of his right to state-financed blood tests; (b) conducts the paternity trial as a default proceeding, despite defendant's presence in the courtroom; (c) fails to offer the defendant any oppor- opportunity to cross-examine his accusors; (d) fails to offer to defendant the opportunity to call witnesses on his own behalf; and (e) thereafter

compels defendant to testify against his interests at the request and on behalf of the state's prosecution.

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OPINIONS BELOW

The Opinion of the Oregon Court of Appeals, dated May 12, 1982, is reported at 57 Or App 303, 644 P2d 1132 (1982).

JURISDICTION

On March 6, 1981, Judge Harlow F. Lenon of the Circuit Court of Multnomah County, Oregon signed an order denying Jeffrey Stoutt's motion for a stay of entry of judgment and for appointment of counsel. The court directed entry of a Judgment Establishing Paternity. That judgment was appealed to the Oregon Court of Appeals, which, on May 12, 1982, filed its opinion affirming the judgment of the Circuit Court (see A-1-33).

Jeffrey Stoutt thereafter filed a Petition for Review seeking discretionary review of the opinion of the Court of Appeals in the Oregon Supreme Court. On October 26, 1982, the Oregon Supreme Court denied this petition for review (see A-34). Within 21 days, Jeffrey Stoutt filed a Petition for Reconsideration with the Oregon Supreme Court. On November 30, 1982, the Oregon Supreme Court denied that petition for rehearing (see A-35). This Petition for Writ of Certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 USC § 1257 (1976).

STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in part:

> "Section 1.
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case involves Oregon Revised Statutes §§ 109.125, 109.135, 163.555, 416.405, 416.410 and 418.042. It involves 42 USC §§ 602(a)(26) and 604 (1976); and Regulatory Provision 45 CFR § 232.11 (1981), all of which are set out verbatim in the appendix (see A-36-50).

STATEMENT OF THE CASE

Petitioner Jeffrey Stoutt was an 18-year-old when, on January 31, 1980,

he was served with the state's Petition To Establish Paternity.

On February 29, 1980, he appeared by himself before the Honorable William R. Riggs in the Circuit Court of Multnomah County, Oregon. At that time, he entered a denial of paternity. He advised the court that he did not know whether he wanted a trial by jury, but that he did intend to hire an attorney.

Jeffrey Stoutt was never able to afford private counsel. His indigency was established by affidavit and has not been challenged on appeal.

Although without counsel, Jeffrey Stoutt appeared for deposition on March 11, at the State Office of Adult and Family Services in Portland, Oregon. He appeared alone. He told the State's attorney that he had been unable to get a job and therefore could not afford

to hire an attorney. The State's attorney proceeded with the deposition.

In deposition, Jeffrey Stoutt did not deny some sexual involvement with the infant's mother, Ms. Kay DeShazer. However, he testified that the infant's mother had been "going out" with two or three other men at the same time. Jeffrey Stoutt supplied the State's attorney with names of two of the other men, and even identified the place of employment of one of the additional boyfriends.

After the deposition, the State's attorney served Jeffrey Stoutt with a Request for Admissions which asked Stoutt to admit that he had had a steady social and sexual relationship with Ms. DeShazer from September 1977 to December 1979. Under the Oregon Rules of Civil Procedure, failure to serve a

written answer or objection to a request for admissions within 30 days results in admission of the requests. ORCP 45.

On January 5, 1981, Jeffrey Stoutt appeared alone at his paternity trial. The State's attorney advised the court of Stoutt's presence in the courtroom. He didn't tell the court of Jeffrey Stoutt's inability to afford private counsel. The State's attorney advised the judge

> "I don't believe he came prepared to defend himself. I assume since he didn't see fit to retain counsel, I would be prepared to go ahead and put on our case and have him represent himself." (Emphasis supplied.)

Instead of permitting Jeffrey Stoutt to represent himself, the court elected to try the matter as a default proceeding. The court thereby disregarded Stoutt's presence in the

courtroom during his own trial. No invitation was extended to Jeffrey Stoutt to cross-examine his accusers.

The State's attorney called Ms. DeShazer and three corroborating witnesses. Ms. DeShazer's testimony on the issue of paternity merely affirmed and denied leading statements of fact made by the State's attorney. Her entire testimony consisted of saying "yes" or "right" on 21 occasions, and "no" on one occasion.

The testimony by the three witnesses which followed was based entirely on the statements made by Ms. DeShazer. At the conclusion of the testimony by the State's witnesses, the court indicated that it was dissatisfied with the corroborating testimony, commenting

> "Corroboration has to be other than from the mouth of the mother."

In response to the court's concern, the State's attorney requested the opportunity to call Jeffrey Stoutt to the stand. Even though the court had to that point proceeded as in a default hearing, disregarding the defendant's presence in the courtroom, it granted the State's request to call Jeffrey Stoutt to the stand.

The State's attorney then cross-examined Jeffrey Stoutt using his prior deposition testimony. Only inculpatory deposition testimony was introduced at this time. The State's attorney made no mention of Jeffrey Stoutt's prior testimony that other men had been dating Ms. DeShazer near the time of conception. There was also no reference to his contention that Ms. DeShazer had been been involved, on a prior occasion, in a similar paternity

action. Based principally on Jeffrey Stoutt's deposition testimony of some sexual involvement, the judge made a finding of paternity.

Jeffrey Stoutt then went to the American Civil Liberties Union of Oregon, which agreed to represent him, without cost, on the issue of his right to court-appointed counsel. Petitioner Stoutt, through ACLU counsel, moved the court for appointment of counsel and for a stay of entry of judgment. At a hearing on March 2, 1981, the court denied both of these motions, and directed entry of a judgment of paternity. An appeal from that order and judgment was taken.

On May 12, 1982, the appellate court found that Jeffrey Stoutt's due process rights were not violated by the court's failure to appoint counsel, even

though state-financed blood tests[1] were never made available to Stoutt.[2]

> "We conclude that an attorney could have had little effect on the result in this proceeding and that defendant had no due process right to appointed counsel." 57 Or App at 312 (footnote omitted).

The Honorable George A. Van Hoomissen, judge of the Oregon Court of Appeals, dissented from the Appellate Court's conclusion that Jeffrey Stoutt had no due process right to appointed counsel. He wrote:

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1. Little v. Streater, 452 US 1 (1981), which held there was a due process right to state-financed blood tests in actions of this kind, was decided on June 1, 1981, almost a year before the appellate court's opinion in this case.

2. The Court also denied Stoutt's contention that Art. 1 § 11 of the Oregon Constitution, which requires representation by counsel in criminal cases, compels appointment of counsel in quasi-criminal actions such as state-initiated paternity proceedings.

"My experience as a trial judge on the Multnomah County Circuit Court, Department of Domestic Relations, satisfies me that it was 'fundamentally unfair' to proceed to an adjudication of paternity in the absence of appointed counsel on the facts of this case. I would, therefore, reverse and remand for the appointment of counsel and a new trial. ***

"The state has chosen an adversarial forum to resolve this contested paternity dispute. It has provided a deputy attorney general to prosecute the proceedings. It has fixed serious long term consequences to the outcome for both child and defendant, including the possibility of imprisonment for defendant should he willfully fail to pay child support. See, e.g., ORS 109.103 (duty to support) and ORS 163.555 (criminal nonsupport). I conclude that due process mandates the appointment of counsel for this indigent defendant. U.S. Const. Amend XIV, § 1." (Citations and footnotes omitted.) 57 Or App at 315.

On petition, the Oregon Supreme Court denied discretionary review.

Based upon intervening judicial authority, Jeffrey Stoutt petitioned the Supreme Court to reconsider its denial of review. That Court denied Stoutt's request for a rehearing on November 30, 1982.

APPEARANCE OF FEDERAL QUESTION

Jeffrey Stoutt, in a post-trial motion prior to entry of judgment, raised the issue of his right to court-appointed counsel under the due process clause of the Fourteenth Amendment. The trial judge denied Stoutt's Motion for Appointment of Counsel stating:

> "Now, whether there is a right to have a lawyer when a man's parenthood is being insisted upon by the State and who is denying it, I can't say.
>
> "There are questions of justice, I suppose, but I don't know whether there are questions of constitutionality. There is no

> concurrence between the boundaries of constitutionality and the boundaries of social justice. Social justice is a nonlegal concept. Constitutional justice is something entirely different.
>
> "I have to say that there being no precedent for a lawyer in the language of constitutional justice, whether there ought to be a consideration for a lawyer in the language of social justice is beyond my authority to declare.
>
> "So the motion to appoint a lawyer is denied ***."

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE OREGON COURT OF APPEALS IS CONTRARY TO THE DUE PROCESS ANALYSIS PROMULGATED BY THIS COURT AND IS IN CONFLICT WITH THE OPINIONS OF OTHER STATE COURTS OF LAST RESORT.

1. Jeffrey Stoutt Was Denied a Meaningful Opportunity to Be Heard

The decision in this case is contrary to this Court's analysis of the

scope of due process guarantees in state-initiated civil and quasi-criminal proceedings. Little v. Streater, 452 US 1 (1981); Lassiter v. Dept. of Soc. Serv. of Durham Cty., 452 US 18 (1981); Mathews v. Eldridge, 424 US 319 (1976). The Oregon Court of Appeals disregarded obvious procedural errors, which, cumulatively, denied Jeffrey Stoutt any meaningful opportunity to be heard in his own defense. In affirming the judgment, the appellate court sanctioned an adjudication which was fundamentally unfair and far more one-sided and procedurally flawed than the adjudication this Court reversed in Little v. Streater, supra.

In Lassiter v. Dept. of Soc. Serv. this Court determined that there is a presumption of no due process right to court-appointed counsel where there is no threat of incarceration, but that the presumption can be overcome

> "*** if, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel." 452 US at 31-32.

In Mathews v. Eldridge, this Court upheld the constitutionality of administrative procedures established for assessing continuing disability in social security cases. The Court identified three factors critical to analysis of the dictates of due process generally. These are: (1) the private interest that will be affected by official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including

the fiscal burdens that the additional or substitute procedures would entail. 424 US at 335.

Underlying the court's analysis in both of these opinions is the fundamental proposition that due process guarantees the opportunity to be heard at a meaningful time and in a meaningful manner. 424 US at 333.[3]

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3. The proposition that the due process right to be heard means the right to be heard by counsel finds its recent origins in Powell v. State of Alabama, 287 US 45, 53 S Ct 55, 77 L Ed 158 (1932), where Justice Sutherland wrote:

> "*** The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determing for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he

While Lassiter and Mathews provide the framework for analyzing an

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> may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state of federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." 287 US at 68-69.

indigent respondent's due process right to appointed counsel in state-initiated proceedings not directly threatening incarceration, Little provides a more specific holding on the minimum process guaranteed by the Constitution in the context of a state-initiated paternity action. Little held that an indigent respondent in a state-initiated paternity action has a due process right to statefinanced blood tests where he is otherwise unable to afford the same.

The proceeding in Little was nearly identical to the one utilized in this case. In both cases, the paternity action was initiated by the state because the mother was receiving public assistance. In both cases, the state was compelled by federal statute

to bring a paternity action to identify the putative father. 42 USC §§ 602(a) (26) and 604 (1976). The mother was compelled to cooperate. Conn. Gen. Stat., § 46b-169 (1981); ORS §§ 109.125, 416.405, 416.410 and 418.042. In neither case was the indigent respondent given access to statefinanced blood tests. Indeed, the most significant distinction between this and Walter Little's case is the continued presence of legal aid counsel throughout Little's adjudication. At trial, Jeffrey Stoutt had neither the advice of counsel, nor access to blood tests.

This court characterized the state involvement in Little's paternity action as pervasive, giving the action a quasi-criminal overtone. In addition, the Court reasoned that the state's creation of a familial relationship

involves family rights which are at the core of those rights revered by our society.[4]

> "*** Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the posssible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court has frequently stressed the importance of familial bonds whether or not legitimized by marriage, and accorded them constitutional protection." 452 US at 13.

Having established a threat to important liberty and property interests, the Court turned to the analysis advanced in

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4. Freedom of personal choice in matters of family life has long been viewed as a fundamental liberty interest. Smith v. Organ. of Foster Families, 431 US 816, 845; Moore v. City of East Cleveland, Ohio, 431 US 494, 499 (1977); Prince v. Commonwealth of Massachusetts, 321 US 158, 166 (1944); Pearce v. Society of the Sisters of the Holy Names, 268 US 510, 534-535 (1925). A state action which imposes paternity, of necessity, restricts alternative familial decisions.

Mathews v. Eldrige, supra, to determine whether the state's interests were sufficient to justify the obvious risk of error posed by the paternity proceeding. This Court concluded that the state's financial interest in efficient paternity actions was far from sufficient to warrant the high risk of error apparent in Walter Little's adjudication. By denying indigent Little access to state-financed blood tests, the trial court denied him any meaningful opportunity to defend himself. 452 US at 14.

It is apparent from the record in this case that Jeffrey Stoutt was not offered even the minimum process due under this court's analysis in Little v. Streater. Without access to counsel or to blood tests, Jeffrey Stoutt had far

less opportunity to defend himself than Walter Little.[5]

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5. The Court of Appeals suggested that the evidentiary burden in Connecticut, which permits a finding of paternity based on the mother's uncorroborated testimony, put Walter Little at a disadvantage not experienced by Jeffrey Stoutt, because Oregon requires such corroboration. Compare Conn Gen Stat § 46b-160 (1981) with ORS 109.155(1). (See A-51, A-54) Hence, the court concluded the failure to offer blood tests was not a flaw fatal to the proceedings below.

This analysis misses the critical question of whether the defendant was offered a meaningful opportunity to be heard. Because Little was denied access to blood tests, he was deprived of a key element of his defense, and consequently the right to a meaningful opportunity to be heard. Yet Walter Little had the assistance of legal aid counsel throughout his trial.

In calculating the disadvantage to the defendants, and the corresponding increased risk of error, it would appear that the right to counsel, at least where the trial judge, as here, makes no effort to assist the indigent defendant with his own defense, is far more critical to a fair and accurate determination of paternity than the particular evidentiary standard applied to

This unfortunate situation was compounded by the trial court's failure to permit Jeffrey Stoutt to represent himself at his paternity trial. Because the trial court proceeded as in a default hearing, despite Stoutt's presence in the courtroom, it denied Jeffrey Stoutt the opportunity to make an opening statement, to cross-examine the state's witnesses or present witnesses or testimony on his own behalf. These are fundamental procedural errors which never would have occurred had Jeffrey Stoutt been represented by counsel. They demonstrate that the proceeding was far

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the case. It is unlikely that Jeffrey Stoutt ever understood or appreciated his purported evidentiary advantage, for the trial judge made no effort to explain the proceeding. Without counsel, Jeffrey Stoutt had no opportunity to defend himself, regardless of the evidentiary rule applicable to this case.

beyond the understanding and skills of Jeffrey Stoutt. He never had a chance to defend himself.[6]

It is also unlikely that the defendant understood the long-term consequences of this adjudication. Besides affecting personal familial

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6. These procedural errors, which appear on the face of the record, were brought to the appellate court's attention to demonstrate the consequences and high risk of error which result from placing an indigent teenager in a formal judicial setting, without the assistance of counsel. Whether such errors constituted independent grounds for assignment of error, or reversal, is not the point. See Stoutt, supra, 57 Or App at 314, n. 9; (A-29, n. 9). Under Oregon law the appellate court was required to, and did, conduct a de novo review of the record of this case. ORS §§ 19.125(3); 109.135(1) (A-45, 53) 57 Or App at 312 (A-23). The appellate court even concluded that such review was dictated by the Lassiter analysis. Id. There is therefore no question that the Constitutional issue presented by this petition is properly before this Court.

decisions, an adjudication of paternity carries 18 years of child support obligations. Jeffrey Stoutt, only 18 years old at the time this proceeding began, will be obligated to make child support payments until he is 36 years old.

Should he fail to meet these support obligations, Jeffrey Stoutt risks criminal liability for nonsupport, a class C felony under Oregon law ORS 163.555; (See A-46). Because prosecution under that statute only requires the state to prove Jeffrey Stoutt is a person "lawfully charged with *** support," the state, through this purportedly civil proceeding, has established a major element of a subsequent criminal action. The civil adjudication of paternity has res judicata effect on a major element of a subsequent felony prosecution. See State

ex rel. Hamilton v. Snodgrass, 325 NW2d 740, 742, 747 (Iowa 1982); Reynolds v. Kimmons, 569 P2d 799, 802 (Alaska 1977); Artibee v. Cheboygan Circuit Judge, 243 NW2d 248, 250 (Mich 1976). The procedding therefore carries a distinct threat of future incarceration not present in Lassiter v. Dept. of Soc. Services, supra. Jeffrey Stoutt risks future incarceration without ever having had a meaningful opportunity to be heard on the issue of paternity.

Mindful of the presumption against the right to counsel developed in Lassiter, petitioner believes, on the record in this case, the appellate court's failure to reverse and direct appointment of counsel poses the question of whether an indigent defendant ever has a right to court-appointed counsel in a

state-initiated paternity proceeding. Such a right was apparently preserved in Lassiter for certain egregious circumstances. This case presents those circumstances.

In this case, the appellate court affirmed an adjudication with procedural flaws that directly conflict not only with the specific holding of this Court in Little v. Streater, supra, but also with the weight of constitutional authority guaranteeing a defendant a reasonable opportunity to be heard in his own defense. Boddie v. Connecticut, 401 US 371, 377 (1971); Goldberg v. Kelly, 397 US 254, 267 (1970); Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 178, (1951) (Frankfurter concurring); Mullane v. Central Hanover Bank &

Trust Co., 399 US 306, 313 (1950); Grannis v. Ordean, 234 US 385, 394 (1914); Hovey v. Elliott, 167 US 409 (1897); Windsor v. McVeigh, 93 US 274, 277 (1876). Under such circumstances Court-appointed counsel is mandated, even under the weighted analysis of Lassiter.

Where the state, itself, elects the adversary forum for resolving an issue as significant as paternity it cannot deny the defendant access to the means of his defense.

> "*** [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v. Connecticut, supra, 401 US at 377.

2. The Oregon Court of Appeals Erred in Concluding An Attorney Could Have Had Little Effect on the Outcome of This Case

In finding an attorney could have had little effect on this case, the Court of Appeals impliedly concluded that there was little risk of error in this paternity adjudication, despite its obvious and fundamental procedural errors and the lack of any reliable scientific evidence of paternity.

Such a conclusion was necessary to buttress the court's analysis of the Mathews v. Eldridge factors. Because of the significant familial and liberty interests adjudicated by these proceedings, and the substantial criminal and financial risks to the defendant posed by child support obligations, the appellate court had to find that the risk of error was insignificant. Otherwise, the state's limited financial

interest in avoiding the cost of court-appointed counsel, alone, would be insufficient to justify denying Jeffrey Stoutt's request for counsel.

Unfortunately, the Court's conclusion on this issue is wrong. It is unsubstantiated by blood test evidence. It is also contrary to the findings of this and several other courts. If anything, paternity proceedings are notorious for their unusually high risk of error.

For example, in Little this Court referenced a study by Professor Krause which revealed that conviction rates of 95 percent in disputed paternity cases are not uncommon. The same study also found in a test of 1,000 cases of contested paternity that fully 39.6 percent of the accused men could not possibly be the fathers of the children

in question. There was even an 18 percent exclusion rate among defendants admitting paternity. Krause, Illegitimacy Law and Social Policy, at 106-108, citing Sussman, "Blood Grouping--A Review of 1,000 Cases of Disputed Paternity," 40 Am J Clinical Pathology 38 (1963).

Yet another study of 312 disputed paternity cases revealed that "93% of the tested parties lied in some respect when they testified in court as to their sexual relationship." Krause, supra, citing Arthur & Reid, "Utilizing the Lie Detection Technique to Determine the Truth in Disputed Paternity," 48 J Crim L C & P S, 215, 218 (1954). In Portland, Oregon, a laboratory conducting blood tests in state-initiated paternity cases revealed a 23 percent exclusion rate among the putative fathers tested.

The unreliability of these proceedings, where no blood test evidence is adduced, is only compounded when one party is represented by counsel and the other is not. This unreliability has drawn criticism in several state courts. The California Supreme Court, finding appointed counsel essential to paternity proceedings, commented:

> "A judgment rendered in this manner is not only unfair, it is unreliable. Recognizing the complexity of these proceedings and the importance of their outcome to the state, the mother and the child, the Legislature has afforded the mother and child the assistance of counsel in prosecuting their claim. However, by intervening heavily on behalf of one side in what has traditionally been a private dispute, the state has skewed the outcome of the case. The chances that the significant consequences of fatherhood will be imposed on an innocent man obviously increase

> dramatically if, because he is unable to afford counsel, the defendant offers no defense. They increase still further if counsel for the plaintiff is a specialist in prosecuting such claims. (See Gliaudys, supra, 53 State Bar J. at p. 324.) Unless the rights of indigent paternity defendants are protected, courts risk finding not the right man, but simply the poorest man to be the father of a child. [Footnote omitted.] If paternity is to be determined in an adversary proceeding at the behest of the state, surely the interests of all concerned demand that the defendant be able to defend fully and fairly. He cannot do so when his indigency prevents him from obtaining counsel." Salas v. Cortez, 24 Cal 3d 22, 31, 593 P2d 226, 154 Cal Rptr 529 (1979), cert denied 444 US 900 (1979) (citations omitted).

The Minnesota Supreme Court held appointment of counsel essential to the fair administration of justice in its state courts, because it found "in the trial of a contested paternity

action, appallingly little attention is given to the accuracy of the determination." Hepfel v. Bashaw, 279 NW2d at 342, 345 (Minn 1979).

The West Virginia Supreme Court of Appeals also determined that appointed counsel is essential to a fair and just paternity proceeding:

> "*** The state comes well represented by attorneys when it hauls a putative father into court; fairness and justice demand that he be provided court-appointed counsel if he is indigent." State ex rel. Graves v. Daugherty, 266 SE2d 142, 145 (W Va 1980).

The risk of error is also compounded by the nature of the state's interest in this case. In Oregon, as in most states, the state is entitled to initiate a paternity action when the mother is receiving public assistance. ORS 109.125. The mother, as a recipient of public aid, is required

to cooperate. 42 USC §§ 602(a)(26) and 604 (1976); 45 CFR § 232.11 (1981); ORS § 418.042. Thus, the state, not the child or mother, "can potentially become the aggressive and predominant party in interest, emphasizing primarily its concern to find the man it can legally hold financially liable to reimburse it for *** support expenses ***." Hepfel, supra, 279 NW2d at 346.

Were the paternity proceeding merely a civil action between private parties, those cases where the unwed mother was not interested in sharing her parentage with the true father, was unwilling to pursue him or was simply unsure of his identity, would never reach the court docket. When the state compels cooperation from the mother she is forced to make an

identification she might otherwise be unable or unwilling to make. There are any number of reasons for her to make an erroneous identification, to protect herself or her partner. See Cortese v. Cortese, 10 NJ Super 152, 76 A2d 717, 718 (1950). The state not only skews the outcome of the proceeding by intervening heavily on behalf of one side to the action; but, by threatening termination of public assistance to the unwed mother, also coerces its chief witness to give (and procure from witnesses)[7] testimony which she might otherwise be reluctant or unable to provide.

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7. In this case the trial judge concluded that all of the corroborating testimony by the state's witnesses was based upon statements made by the infant's mother.

Given the recognized efficacy of blood testing for paternity, it is constitutionally unacceptable in this day and age for paternity to be adjudicated in this manner. Where the defendant faces the full prosecutorial resources of the state without access to blood tests or counsel, there is an unreasonable risk of erroneous adjudication. While the due process clause does not mandate that all government or judicial decisions be error-free, it does require that the legal process be guided by its primary function--to minimize the risk of erroneous decisions. Little v. Streater, supra. Mackey v. Montrym, 443 US 1, (1979). Addington v. Texas, 441 US 418, (1979).

It is more than a little ambiguous for the state, on the one hand, to offer the defendant in a paternity action the due process guarantees inherent in the right to a formal trial by jury (ORS 109.135) and, on the other hand, to effectively extinguish an indigent's right to a fair adjudication by intervening heavily on the behalf of the petitioner while effectively denying the indigent respondent access to blood tests or defense counsel. Because the degree of public trust and esteem for our court system is often measured by the experience of the common man in court, Mayer v. City of Chicago, 404 US 189 (1971) proceedings as one-sided as this should not be condoned by our appellate courts.

3. Conflicting State Opinion

Several state courts have found a due process right to counsel in state-initiated paternity actions. See Reynolds v. Kimmons, 569 P2d 799, 803 (Alaska 1977) (under state constitution); Artibee v. Cheboygan Circuit Judge, 397 Mich 54, 59, 243 NW2d 248, 250 (1976) (under state constitution); Salas v. Cortez, 24 Cal 3d 22, 34, 593 P2d 226, 234, 154 Cal Rptr 529, 537, cert denied, 444 US 900, 100 S Ct 209, 62 L Ed 2d 136 (1979) (under both federal and state constitutions); Hepfel v. Bashaw, 279 NW2d 342, 348 (Minn 1979) (under supervisory power of court to ensure fairness); Wake County ex rel. Carrington v. Townes, 53 NC App 649, 654, 281 SE2d 765, 769 (1981), modified and remanded, ___ NC ___, 293 SE2d 95,

100-01 (1982) (under both federal and state constitutions); M. v. S., 169 NJ Super 209, 216, 404 A2d 653, 656 (1979) (unspecified basis); Madeline G. v. David R., 95 Misc2d 273, 276, 407 NYS2d 414, 416 (1978) (under both federal and state constitutions); State ex rel. Graves v. Daugherty, 266 SE2d 142, 145-46 (W Va 1980) (under state constitution).

Other states have reached a contrary position. See State ex rel. Hamilton v. Snodgrass, 325 NW2d 740 (Iowa 1982); Wake County ex rel. Carrington v. Townes, ___ NC ___, 293 SE2d 95, 100 (no absolute due process right to appointed counsel in paternity cases; decision is vested in state trial court, subject to appeal); Sheppard v. Mack, 68 Ohio App 2d 95, 103, 427 NE2d 522, 528 (1980) (no due

process or equal protection right to appointed counsel); State v. Walker, 87 Wash2d 443, 445, 553 P2d 1093, 1095 (1976) (no due process or equal protection right to appointed counsel). In none of these latter cases, however, were the defendants denied the fundamental procedural rights denied to Jeffrey Stoutt.

CONCLUSION

The Oregon Court of Appeals misapplied this court's opinions in Lassiter and Little. It disregarded the obvious procedural errors of the trial court which, cumulatively, denied Jeffrey Stoutt any meaningful opportunity to be heard in his own defense.

By granting this petition this Court can resolve a conflict among the states, reverse a decision which conflicts with prior opinions

of this Court, establish guidelines for appellate review of due process claims, and correct a patent injustice to petitioner Jeffrey Stoutt.

Respectfully submitted,

_____

Andrew R. Gardner
Of Attorneys for
Jeffrey Stoutt

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

State of Oregon, ex rel
Adult and Family Services
Division,

Respondent,

v. No. D8002-60802
CA A20557

Jeffrey Stoutt,

Appellant.

****

Appeal from Circuit Court, Multnomah County.

Harlow F. Lenon, Judge.

Argued and submitted February 17, 1982.

Andrew R. Gardner, Cooperating Attorney, American Civil Liberties Union, Portland, argued the cause and filed the briefs for appellant.

Jan Peter Londahl, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, Stanton F. Long, Deputy Attorney General, and William F. Gary, Solicitor General, Salem.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P. J.

Affirmed.

VAN HOOMISSEN, J., dissenting.

FILED: May 12, 1982

RICHARDSON, P. J.

Petitioner, a state agency, initiated this filiation proceeding pursuant to ORS 109.125(1)(b),[1] alleging that defendant is the father of a child who was born out of wedlock and to whose support petitioner contributes.

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1. ORS 109.125(1)(b) provides:

> "(1) Any of the following may initiate proceedings under this section:
>
> "* * * * *
>
> "(b) Any state agency, if furnishing support to the mother for the benefit of the child or if furnishing services or assistance of any kind because of the birth, or impending birth, of the child;
>
> "* * * * *."

Defendant appeals from the trial court's judgment finding him to be the child's father. His only argument on appeal is that, because he is indigent, his Fourteenth Amendment due process rights and his rights under Article I, Section 11 of the Oregon Constitution were violated by the denial of his request for court-appointed counsel.[2] We affirm.

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2. Although defendant attended the adjudicative hearing, he had not responded to petitioner's request for admissions. ORCP 45. The hearing was therefore conducted as a default proceeding, notwithstanding defendant's presence. At the conclusion of the hearing, the trial judge orally announced his finding of paternity, but he allowed defendant 30 days to engage a lawyer and to present denials and a "defense other than that of bare denial."

We understand that defendant then contacted the American Civil Liberties Union and that that organization agreed to provide counsel to represent him solely on the issue of

In their arguments on the due process issue, the parties focus on Little v. Streater, 452 US 1, 101 S Ct 2202, 68 L Ed 2d 627 (1981), and Lassiter v. Department of Social Services, 452 US 18, 101 S Ct 2153, 68 L Ed 2d 640 (1981). In Little, the Supreme Court held that the indigent defendant in a Connecticut paternity suit had a due process right to a blood grouping test at public expense. Lassiter was a termination of parental rights case in which the indigent mother argued that she was entitled to a court-appointed attorney. The court held, generally, that whether

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his entitlement to court-appointed counsel. The attorney presented argument on that issue in the trial court and now represents defendant in this appeal from the trial judge's denial of the request for appointed counsel.

due process requires free counsel in termination proceedings must be determined on a case-by-case basis and, specifically, that the mother there was not entitled to appointed counsel.

The Court stated:

> "In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.
>
> * * * * *
>
> "The case of Mathews v. Eldridge, 424 U.S. 319, 335, [96 S Ct 893, 47 L Ed 2d 18 (1976),] propounds three elements to be evaluated in deciding what due process requires, viz., the

private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to apointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

* * * * *

"If, in a given case, the parent's interests were at their stongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the Eldridge factors will not always be so distributed, and since 'due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed,'

> Gagnon v. Scarpelli, supra, 411 U.S. [778] at 788, [93 S Ct 1756, 36 L Ed 656 (1973),] neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in Gagnon v. Scarpelli, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. * * *" 452 US at 26-27, 31-32.

The Court then concluded that, in light of the procedural and evidentiary factors involved in the case before it, denial of court-appointed counsel did not violate the mother's due process rights. It stated:

> "* * * The Department of Social Services was represented at the hearing by counsel, but no expert witnesses testified, and the case presented no specially

troublesome points of law, either procedural or substantive. While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she had few sparks of such an interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference. True, a lawyer might have done more with the argument that William should live with Ms. Lassiter's mother--but that argument was quite explicitly made by both Lassiters, and the evidence that the elder Ms. Lassiter had said she could not handle another child, that the social worker's investigation had led to a similar conclusion, and that the grandmother had displayed scant interest in the child once he had been removed from her daughter's custody was, though controverted, sufficiently substantial that the absence of counsel's guidance on this point did not render the proceedings

> fundamentally unfair. * * *"
> 452 US at 32-33.[3]

In Little, the defendant sought an order in the trial court that blood grouping tests be performed on the mother and child and that, in light of the defendant's indigency, the state be required to pay for the tests. The Court authorized the tests; however, relying on a Connecticut statutory requirement that "[t]he costs of making such tests shall be chargeable against the party" moving for them, the court declined to order that the state pay. Consequently,

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3. In State v. Jamison, 251 Or 114, 444 P2d 15, 444 P2d 1005 (1968), the Supreme Court held that indigent parents in termination cases have a general due process right to the appointment of counsel. We are not called upon in this case to decide whether or in what ways Jamison is affected by Lassiter.

the tests were not performed. The defendant was found to be the father.

In considering whether the defendant had a due process right to a blood test at state expense in a state-initiated paternity proceeding, the Supreme Court applied the three-factor test of Mathews v. Eldridge, 424 US 319, 335, 96 S Ct 893, 47 L Ed 18 2d (1976), as it had in Lassiter. The court first concluded that the private interests involved were substantial and then explained:

> "* * * Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. * * *

> Just as the termination of such bonds demands procedural fairness, see Lassiter v. Department of Social Services, [452 U.S.] 18, [101 S Ct 2153, 68 L Ed 2d 640 (1981),] so too does their imposition. Through the judicial process, the State properly endeavors to identify the father of a child born out of wedlock and to make him responsible for the child's maintenance. Obviously, both the child and the defendant in a compelling interest in the accuracy of such a paternity action have a determination. (Footnote omitted.) 452 US at 13.[4]

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4. Were it not for the Supreme Court's contrary determination, we perhaps would agree with petitioner's contention that a putative father's interest in a paternity decision is not nearly as substantial as a parent's interest in a termination decision. Although the Supreme Court characterizes the decision in a contested paternity case as establishing a parent-child relationship, that relationship is almost certain to remain an unwanted one on the part of the father and one which offers no nurturing to the child. Conversely, a parent who resists termination of his or her rights in a child has an interest which goes well beyond that of a putative father who seeks to avoid the adjudication of and responsibility for his parental status.

The Court acknowledged that the state has a legitimate interest in having "paternity actions in which it is involved proceed as economically as possible," 452 US at 14, but concluded that

> " * * * the State's monetary interest 'is hardly significant enough to overcome private interests as important as those here.' Lassiter v. Department of Social Services, [supra,] at 28." 452 US at 16.

As we read Little, however, the principal basis for the Court's decision was that blood grouping tests were critical to avoid error in the paternity determination, given the Connecticut statutory scheme. The Court pointed to the high degree of reliability of the tests in negating paternity. It then noted that, under the applicable state statutes as interpreted by the Connecticut courts,

the mother's testimony is sufficient to establish a prima facie case, and

> "* * * the defendant in a paternity suit is placed at a distinct disadvantage in that his testimony alone is insufficient to overcome the plaintiff's prima facie case. Among the most probative additional evidence the defendant might offer are the results of blood grouping tests, but if he is indigent, the State essentially denies him that reliable scientific proof by requiring that he bear its cost. See Conn. Gen. Stat. § 46b-168 (1981). In substance, the State has created an adverse presumption regarding the defendent's testimony by elevating the weight to be accorded the mother's imputation of him. If the plaintiff has been 'constant' in her accusation of paternity, the defendant carries the burden of proof and faces severe penalties if he does not meet that burden and fails to comply with the judgment entered against him. Yet not only is the State inextricably involved in paternity litigation such as this and responsible for an imbalance between the parties, it in effect forecloses what

> is potentially a conclusive means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause." 452 US at 12.

The Court held that, "in these specific circumstances, the application of Conn. Gen. Stat. 46b-168 (1981) to deny appellant blood grouping tests because of his lack of financial resources violated the due process guarantee of the Fourteenth Amendment." 452 US at 16-17. (Emphasis added; footnote omitted.)

The circumstances here differ from those in Little in two significant respects: first, the cost to the state of providing court-appointed counsel would obviously be substantially greater than the cost of providing blood grouping evidence; and, second, the evidentiary scheme

in Oregon paternity cases does not create a presumption against the defendant, based on the mother's testimony, which he cannot rebut by his own testimony. Indeed, ORS 109.155(1) does essentially the opposite, by providing:

> "The court or the jury, in a private hearing, shall first determine the issue of paternity. If the defendant admits the paternity, such admission shall be reduced to writing, verified by the defendant and filed with the court. If the paternity is denied, corroborating evidence, in addition to the testimony of the parent or expectant parent, shall be required." (Emphasis added.)

Read most favorably to defendant's position, Little and Lassiter say that a defendant's private interests in a state-initiated paternity proceeding are substantial enough to necessitate consideration of whether particular procedural protections are required in any given case and

that one of the protections which must be considered is the appointment of counsel if the defendant is indigent. As indicated in Lassiter, the due process considerations favoring the individual proceeded against must be sufficient to overcome the presumption that appointed counsel is required only in cases where the indigent, if unsuccessful, may lose his personal freedom. For reasons similar to the Court's in Lassiter, we conclude that due process did not require the appointment of an attorney for defendant in this case.

The Court observed in Lassiter that:

> "* * * [T]he ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand

> and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made. * * *" 452 US at 30.

It nevertheless concluded that the issues and procedures in that case were such that "the presence of counsel * * * could not have made a determinative difference." 452 US at 32-33.[5]

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5. After this case was submitted, the United States Supreme Court held in Santosky v. Kramer, ___ US ___, ___ S Ct ___, ___ L Ed 2d ___, 50 USLW 4333 (March 24, 1982), that "due process requires that the State support its allegations by at least clear and convincing evidence" in parental rights termination cases. ___ US at ___ (50 USLW at 4333). The court noted in Kramer:

> "In Lassiter, to be sure, the Court held that

Paternity cases, like termination proceedings, can sometimes

> fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application. 452 U. S., at 31-32 (natural parent's right to court-appointed counsel should be determined by the trial court, subject to appellate review). But this Court never has approved case-by-case determination of the proper standard of proof for a given proceeding. Standards of proof, like other 'procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.' Mathews v. Eldridge, 424 U.S., at 344 (emphasis added). Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed

present complex questions of fact or law. This case did not. The mother testified that she was having sexual relations with defendant on a regular basis at the time of conception and that she was not having sexual relations with anyone else.[6] In his testimony at

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by a constitutionally defective evidentiary standard." ___ US at ___ (50 USLW at 4336). (Footnote omitted; emphasis in original.)

The court also distinguished between the effect on the state's fiscal interests of requiring appointed counsel versus requiring a clear and convincing evidence standard of proof:

> "Unlike a constitutional requirement of hearings, see, e.g., Mathews v. Eldridge, 424 U.S., at 347, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State. ***" ___ US at ___ (50 USLW at 4338).

6. Defendant argues:

> "*** [The mother's] testimony on the issue of

the hearing and in his deposition, defendant also testified that he was having sexual relations with the mother during the month of probable conception and the months preceding and following. At the hearing, he

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> paternity is suspect. She merely affirmed leading statements of fact made by the state's attorney. Her entire testimony consisted of saying 'yes' or 'right' on twenty-one occasions and 'no' on one occasion. Given the fact that she was receiving public assistance, and therefore compelled to assist in the state's prosecution, her testimony is less than reliable."

Assuming arguendo that we can consider the credibility of the witness given the procedural history of this case, see n 2 supra, we are not persuaded that defendant's challenge to her reliability says anything more than that she, like most witnesses who are parties or the equivalent, was interested in the outcome of the proceeding and had consulted with the lawyer who called her before she testified.

stated that no prophylactic measures were used. In his deposition, defendant gave as the reason for his denial of paternity that the mother was going out with other men at the approximate time of conception. However, there was nothing in his testimony to suggest that the mother had intercourse with the other men, and defendant's implied speculation that intercourse might have taken place does not refute the mother's specific testimony that she did not have relations with other men.

Defendant contends that

> "[t]he state's reliance on the record as a basis for disregarding the due process implications of this case, fails by its own logic. The full record is ambiguous; but because Jeffrey Stoutt was not represented by counsel, the full record was never put before the trial court. Indeed the state's total

> reliance on the testimony of [the mother], in complete disregard of Mr. Stoutt's testimony, merely highlights the constitutional defects of the proceeding below. The trial court received only one side of the case - the state's side. Under the circumstances, the outcome was never in doubt.
>
> "Thus the state is technically correct when it asserts 'the issues at the paternity hearing were quite simple ***.' They were simple only because an experienced attorney appeared in an adversarial legal forum and opposed a 19-year-old indigent who never even completed high school. The state's attorney was the only individual adequately trained to present a case, so it is not surprising that he found the proceeding 'quite simple.'"

We do not agree with defendant that "[t]he full record is ambiguous." The portions of defendant's deposition testimony which were not before the trial court have been made part of the record here and, for the reasons

we have noted, the deposition does not aid defendant. There is some logic to defendant's suggestion that it is circular to look to the record to determine whether counsel could have affected the result, when one of the principal missions of counsel in any litigation is to develop the record. However, the Supreme Court arrived at its holding in Lassiter by performing an after-the-fact analysis of the record. If anything, the facts and the issues here are even more clear-cut than those in Lassiter. We conclude that an attorney could have had little effect on the result in this proceeding and that defendant had no due process right to appointed counsel.[7]

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7. Consequently, we do not decide whether due process ever requires the appointment of counsel

Defendant's remaining argument is that Article I, Section 11 of the Oregon Constitution mandates the appointment of counsel for indigent defendants in paternity cases. That section provides, as relevant:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury ***; to be heard by himself and counsel; ***."

Defendant's basic theory is that paternity proceedings, though characterized as "civil," are "quasi-criminal" in nature,[8] and that an

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in Oregon filiation proceedings. As we have noted, the difference between the Connecticut and Oregon statutes concerning proof of paternity and the difference in cost between appointed counsel and blood grouping tests make the Little decision less than conclusive in Oregon.

8. In State v. Morrow, 158 Or 412, 75 P2d 737, 76 P2d 971 (1938), the Supreme Court held that a filiation proceeding did not have the

adjudication of paternity can lead to later criminal sanctions and contempt and other criminal or quasi-criminal proceedings in the event of nonsupport. Although defendant acknowledges that he would be entitled to appointed counsel in any subsequent criminal proceeding, he argues that

> "*** [a]t that point counsel could do nothing to affect the adjudication of paternity at the prior proceeding.
>
> "Providing counsel at such a late stage of the interface between the state and the putative father is a symbolic act which gives the image of due process

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effect of barring a later prosecution for statutory rape on grounds of former jeopardy, because the filiation proceeding was a civil one. The filiation statute in effect at that time differs from the present one, but paternity cases remain civil in nature under the current statutory scheme.

> but contributes little to defendant's right to be heard on the substantive issues which resulted in the criminal exposure. In the prosecution of appellant for nonsupport, the major element of the crime, the obligation itself, would be established by the state through a civil proceeding where appellant was not represented by counsel and had no meaningful opportunity to defend himself."

Defendant's point is not well taken. Although paternity proceedings (like almost all other proceedings) do have ramifications which go beyond the immediate issues adjudicated in them, and those ramifications include the possibility that the court's order may not be complied with, we find the fact that criminal actions can follow from a violation of the court's order to be a peculiarly frail basis for claiming

the right to criminal case protections in this civil proceeding.

Defendant analogizes paternity cases to the putatively "decriminalized" proceedings for driving under the influence of intoxicants (DUII) considered in Brown v. Multnomah County Dist. Ct., 280 Or 95, 570 P2d 52 (1977). The court held in Brown that first offense DUII cases remained criminal in nature, notwithstanding the legislature's classification of the offense as a traffic infraction, and were therefore subject to the protections of Article I, Section 11. The court summarized the bases for its holding:

> "*** Nothing prevents such a decriminalization of traffic offenses, if it is fully carried out. Nor need it exclude the offense of driving under the influence of intoxicants. We hold

> only that, considering the magnitude of the potential fine, the secondary sanctions in case of non-payment, the relationship of DUII to the other major traffic offenses, the evident legislative desire to emphasize the seriousness of this offense while facilitating its punishment, and the retention of criminal law enforcement procedures, the 1975 code did not free this offense from the punitive traits that characterize a criminal prosecution. ***" 280 Or at 110.

The characteristics of paternity cases are not comparable. Although support orders can be issued in paternity cases, as they can in dissolution and certain other civil proceedings, no penal fine can be imposed. A father of a child born out of wedlock is subject to judicial proceedings which can result in his being required to pay the same basic costs as fathers of legitimate children. If he fails

to abide by that requirement, he confronts essentially the same ancillary risks as those which confront any parent who fails to support a child, see ORS 163.555, and any person who violates the order of a court in a civil proceeding. We conclude that Article I, Section 11 does not apply to this case. The trial court correctly denied the motion for court-appointed counsel.

Affirmed.[9]

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9. Some of the procedural events defendant's attorney refers to here to support the contention that a lawyer was essential to due process arguably could have been grounds for independent assignments of error. See n 2, supra. As noted, however, defendant's only contention on appeal and, apparently, the only contention he engaged his attorney to raise in this court is that he was entitled to court-appointed counsel in the trial proceedings. The issue defendant raises is an important one. Defendant's interests in other

VAN HOOMISSEN, J., dissenting.

I respectfully dissent.

My experience as a trial judge on the Multnomah County Circuit Court, Department of Domestic Relations, satisfies me that it was "fundamentally

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aspects of the trial and appeal of this case are also important.

It may be that the appropriate way for attorneys to make one-issue presentations of this kind is an amici curiae, after assuring that the party has been given suitable advice that raising other issues might be of greater immediate benefit to him and that organizations or private attorneys providing pro bono services may be available to raise those issues and to act as the party's primary counsel. A failure to provide that advice can be as defeating to the party's ability to obtain meaningful representation as the absence of appointed counsel. We do not know whether defendant was so advised in this case, and we do not imply that he was not.

unfair" to proceed to an adjudication of paternity in the absence of appointed counsel on the facts of this case. I would, therefore, reverse and remand for the appointment of counsel and a new trial. Lassiter v. Department of Social Services, 452 US 18, 101 S Ct 2153, 68 L Ed 2d 640 (1981); Little v. Streater, 452 US 1, 101 S Ct 2202, 68 L Ed 2d 627 (1981); Mathews v. Eldridge, 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976); State v. Jamison, 251 Or 114, 444 P2d 15, 444 P2d 1005 (1968).[1]

The state has chosen an adversarial forum to resolve this

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1. Accord Reynolds v. Kimmons, 596 P2d 798 (Alaska 1977); Salas v. Cortez, 24 Cal 3d 22, 154 Cal Rptr 529, 593 P2d 226, cert den 444 US 900 (1979); Hepfel v. Bashaw, 279 NW2d 342 (Minn 1979); M. v. S., 169 NJ Super 209, 404 A2d 653 (1979); State ex rel. Graves v. Daugherty, 266 SE2d 142 (W Va 1980).

contested paternity dispute.[2] It has provided a deputy attorney general to prosecute the proceedings. It has fixed serious long term consequences to the outcome for both child and defendant, including the possibility of imprisonment for defendant should he willfully fail to pay child support. See, e.g., ORS 109.103 (duty to support) and ORS 163.555 (criminal non-support). I conclude that due process mandates the appointment of counsel for this

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2. A filiation proceeding, ORS 109.124 et seq, has complex and immediate social and legal implications for the child, father, mother and the state. Mother and alleged father have conflicting interests and motives in such a proceeding. Both the child and the state have a substantial interest in seeing that paternity is established in the biological father and that a defendant who is in fact not the biological father should not be decreed to be the father.

indigent defendant. U.S. Const. Amend XIV, § 1.[3]

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3. I have difficulty with footnotes 2 and 9 of the majority opinion about the role of defendant's counsel. The majority concedes that some of the procedural issues raised in defendant's brief "arguably could have been grounds for independent assignments of error." Here, the ACLU attorney entered the case solely to argue the right to counsel issue. He did not appear generally as counsel for defendant, and at no time has he represented him on the merits. Thus, defendant has not had counsel at trial or on appeal on the central issue in the case, i.e., paternity.

October 26, 1982

Mr. Andrew R. Gardner
Cooperating Attorney
American Civil Liberties Union
of Oregon
900 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97204

Re: SER Adult & Family Services
Division v. Stoutt - CA A20557
SC 28867

Dear Mr. Gardner:

The Supreme Court on October 26, 1982 denied Appellant's Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

/s/
Marilyn Hartley
Supreme Court Calendar
Clerk

November 30, 1982

Mr. Andrew R. Gardner
Cooperating Attorney
American Civil Liberties
Union of Oregon
900 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97204

Re: SER Adult & Family Services
Division v. Stoutt - CA A20557
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42 USC § 602(a)(26) provides:

"§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

"(a) A State plan for aid and services to needy families with children must ***

* * * * *

"*** (26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required--

"(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed,

"(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is

found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2)(without regard to subparagraphs (A) through (E) of such section);

42 USC § 604 provides:

"§ 604. Stopping payments on deviation from required provisions of plan or failure to comply therewith

"(a) In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds--

"(1) that the plan has been so changed as to impose any residence requirement prohibited by section 602(b) of this title, or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or

"(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 602(a) of this title to be included in the plan;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure) until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply. Until he is so

satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

"(b) No payment to which a State is otherwise entitled under this part for any period before September 1, 1962, shall be withheld by reason of any action taken pursuant to a State statute which requires that aid be denied under the State plan approved under this part with respect to a child because of the conditions in the home in which the child resides; nor shall any such payment be withheld for any period beginning on or after such date by reason of any action taken pursuant to such a statute if provision is otherwise made pursuant to a State statute for adequate care and assistance with respect to such child."

45 CFR 232.11 states:

"§ 232.11 Assignment of rights to support.

"(a) The State plan must provide that:

"(1) As a condition of eligibility for assistance, each applicant for or recipient of AFDC shall assign to the State any rights to support from any other person as such applicant or recipient may have:

"(i) In his own behalf or in behalf of any other family member for whom the applicant or recipient is applying for or receiving assistance; and

"(ii) Which have accrued at the time such assignment is executed.

"(2) If the relative with whom a child is living fails to comply with the requirements of paragraph (a)(1),(2), or (3) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

"(3) If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of paragraph (a)(1),(2), or (3) of this section, any aid for which such child is eligible (determined without regard to the needs of the ineligible relative) will be provided in the form of protective payments as described in § 234.60 of this chapter.

"(4) For new applicants, the requirements of paragraph (a) of this section shall be effective August 1, 1975; and for current recipients, it shall be effective as determined by the State agency but not later than the time of the next redetermination of eligibility required by § 206.10(a)(9) of this chapter and in any event not later than February 1, 1976.

"(b) An assignment by operation of State law which is substantially identical to the requirements of paragraph (a)(1) may be utilized in lieu of the assignment described in that paragraph.

"(c) If there is a failure to execute an assignment pursuant to this section, the State may attempt to establish paternity and collect child support pursuant to appropriate State statutes and regulations."

ORS 109.125 provides:

"109.125 Initiation of proceedings. (1) Any of the following may initiate proceedings under this section:

"(a) A mother of a child born out of wedlock or a female pregnant with a child who may be born out of wedlock;

"(b) Any state agency, if furnishing support to the mother for the benefit of the child or if furnishing services or assistance of any kind because of the birth, or impending birth, of the child;

"(c) The duly appointed and acting guardian of the child, conservator of his estate or a guardian ad litem, if the guardian or conservator has the physical custody of the child or is providing support for the child;

"(d) The Support Enforcement Division of the Department of Justice;

"(e) A person claiming to be the father of a child born out of wedlock or of an unborn child who may be born out of wedlock; or

"(f) The minor child by a guardian ad litem.

"(2) Proceedings shall be initiated by the filing of a duly verified petition of the initiating party. The petition shall contain:

"(a) If the initiating party is one of those specified in paragraphs (a) to (d) of subsection (1) of this section:

"(A) The name of the mother of the child born out of wedlock or the female pregnant with a child who may be born out of wedlock;

"(B) Facts showing the petitioner's status to initiate proceedings;

"(C) A statement that the defendant is the father;

"(D) The probable time or period of time during which conception took place;

"(E) A statement of the specific relief sought; and

"(F) A prayer for an order directing the defendant to appear at a time and place certain to answer the petition.

"(b) If the initiating party is a person specified in paragraph (e) of subsection (1) of this section:

"(A) The name of the mother of the child born out of wedlock or the female pregnant with a child who may be born out of wedlock;

"(B) A statement that the initiating party is the father of the child and accepts the same responsibility for the support and education of the child and for all pregnancy-related expenses that he would have

if the child were born to him in lawful wedlock;

"(C) The probable time or period of time during which conception took place;

"(D) A statement of the specific relief sought; and

"(E) A prayer for an order directing the mother or expectant mother of the child and, if any, to the duly appointed and acting guardian of the child and conservator of his estate, if the guardian or conservator has the physical custody of the child or is providing support for the child, to appear at a time and place certain to answer the petition.

"(3) In all cases of public interest, the proceedings may be commenced by the district attorney when requested by any person named in subsection (1) of this section.

"(4) Upon filing of the petition, the court shall make an order directing the defendant to appear at a time and place certain to answer the petition. The order shall further state that for failure to appear as directed the court may enter its decree for the relief prayed for in the petition.

"(5) The order to show cause shall be served as in civil cases by personally serving the defendant with a copy of the order to show cause and petition."

ORS 109.135 provides:

"109.135. (1) All filiation proceedings shall be commenced in the circuit court and shall for all purposes be deemed suits in equity, but either party shall have the right to trial by jury on the issue of paternity.

"(2) All filiation proceedings shall be commenced and tried in the county where either the initiating party or the child resides.

"(3) A proceeding under ORS 109.070 and 109.125 to 109.165 shall be commenced within 10 years after the birth of the child."

ORS 163.555 provides:

"163.555 Criminal nonsupport. (1) A person commits the crime of criminal nonsupport if, being the parent, lawful guardian or other person lawfully charged with the support of a child under 18 years of age, born in or out of wedlock, he refuses or neglects without lawful excuse to provide support for such child.

"(2)(a) It is no defense to a prosecution under this section that either parent has contracted a subsequent marriage, that issue has been born of a subsequent marriage, that the defendant is the parent of issue born of a prior marriage or that the child is being supported by another person or agency.

"(b) In a prosecution for failing to provide necessary and proper medical attention, it is a defense that the medical attention was provided by treatment by prayer through spiritual means alone by adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical attention. Nothing in this subsection shall affect the jurisdiction of the juvenile court in proceedings instituted under ORS chapter 419.

"(3) Criminal nonsupport is a Class C felony."

ORS 416.405-.410 provides:

"416.405 Policy. It is the public policy of this state that dependent children shall be maintained, as much as possible, from the resources of the parents, thereby relieving or avoiding, at least in part, the burden often borne by the general citizenry through public assistance programs. The existing remedies pertaining to family desertion and nonsupport of dependent children are to be augmented by the additional remedies provided in ORS 107.085 and 416.400 to 416.470 which are directed to the real and personal property resources of the responsible parents. These additional remedies are not in lieu of existing law. ORS 107.085 and 416.400 to 416.470 shall be liberally construed and administered to implement the policy stated in this section.

"416.410 Payments to dependent child as debt owed to department; subrogation to right of support action; limitations on recovery right. (1) Except as provided in subsection (3) of this section, any payment of public assistance by the department made to or for the benefit of any dependent child, including any payment made for the benefit of the caretaker of the child, creates an obligation, to be called "state debt," which is due and owing to the department by the parents of the dependent child in an amount equal to the amount of public assistance so paid; provided, however, that:

"(a) Where there has been an Oregon court order directed to a parent, the state debt of that parent shall be an amount equal to the amount of public assistance paid up to the full amount of arrearages under the order, and shall thereafter be limited to and accrue at a rate equal to the payments ordered by the court.

"(b) Where there has been no court order, the administrator may at any time set or reset the amount of state debt accrued and accruing.

"(2) The department shall be subrogated to the right of the dependent child or person having legal or physical custody of such child to prosecute or maintain any support action or execute any administrative remedy existing under the laws of the State of Oregon to obtain reimbursement of moneys thus expended. If a court order enters judgment for or requires payment of an amount of support to be paid by a parent, the department shall be subrogated to the debt created by such order, and such court order shall be deemed to be in favor of the department.

"(3) Subject to the qualification noted in this subsection, a state debt under this section shall not be incurred by nor at any time collected from a parent who is the recipient of general or public assistance as defined in ORS 411.010 for the period during which such parent is eligible for and receiving such

assistance. The exclusion from liability provided by this subsection is limited to those parents who receive such assistance on their own behalf, and does not include parents who receive assistance payments solely on behalf of other people.

"(4) Creation of or exemption from a state debt under this section shall not modify any rights which the department has or may obtain under common or statutory law, including but not limited to those obtained under an assignment of support rights executed pursuant to ORS 418.042. The department's right to recover and retain unreimbursed public assistance is not modified by creation or an exemption from a state debt under this section."

ORS 418.042 provides:

"418.042 Assignment of support rights and cooperation with Department of Human Resources as condition for receipt of aid; protection of legal rights. (1) Aid, as defined in ORS 418.035(2), shall not be granted to, or on behalf of, any applicant, or recipient and for as long as the applicant or recipient refuses to assign to the Department of Human Resources any rights to support from any other person such applicant may have in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and which have accrued at any time such assignment is executed, or refuses to cooperate with the Department of Human Resources in establishing the paternity of a child born out of wedlock and in obtaining support or other payments or property due the applicant or the child.

"(2) However, nothing in this section shall be construed to require an applicant or recipient to provide identification information the validity of which is subject to honest doubts or the public disclosure of which might reasonably tend to subject the applicant to a deprivation of constitutional liberty or property rights."

Conn Gen Stat § 46b-160 provides:

"§ 46b-160. Petition by mother or expectant mother. Venue. Continuance of case. Evidence

"Proceedings to establish paternity of a child born or conceived out of lawful wedlock, including one born to, or conceived by, a married woman but begotten by a man other than her husband, shall be instituted by a verified petition of the mother or expectant mother, with summons and order, filed in the superior court for the geographical area in which either she or the putative father resides. For trial purposes, jurors shall be selected from the judicial district in which such geographical area is located. In cases involving public assistance recipients the petition shall also be served upon the attorney general who shall be and remain a party to any paternity proceeding and to any proceedings after judgment in such action. Upon the filing of such petition, said court or any judge assigned to said court shall cause a summons, signed by him or by the clerk or assistant clerk of said court, to be issued, requiring the putative father to appear in court at a time and place named therein to show cause, if any he has, why the prayer of such petition should not be granted. Such petition, summons and order shall be in a form approved by the judges of the superior court. In the case of a child or expectant mother being supported wholly or in part by the state,

service of such petition may be made by any investigator employed by the department of human resources or the department of income maintenance. No such petition shall be brought after three years from the birth of such child, or after three years from cessation of contribution toward support of the child by the putative father, whichever is later; provided the provisions of section 52-590 shall be applicable to this section. If such putative father fails to appear in court at such time and place, the court may hear the petitioner and enter such judgment and order as the facts may warrant. Such court may order continuance of such hearing; and if such mother or expectant mother continues constant in her accusation, it shall be evidence that the respondent is the father of such child."

ORS 19.125(3) provides:

"19.125 Scope of appellate review ***.

"(3) Upon an appeal from a decree in a suit in equity, the Court of Appeals shall try the case anew upon the record."

ORS 19.155(1) provides:

"109.155 Conduct of trial; postponement; orders. (1) The court or the jury, in a private hearing, shall first determine the issue of paternity. If the defendant admits the paternity, such admission shall be reduced to writing, verified by the defendant and filed with the court. If the paternity is denied, corroborating evidence, in addition to the testimony of the parent or expectant parent, shall be required."

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-1444

In the Supreme Court of the United States

OCTOBER TERM, 1982

JEFFREY STOUTT,

Petitioner,

v.

STATE OF OREGON, ex rel
ADULT AND FAMILY SERVICES DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

In his statement of the case, petitioner has sketched a one-sided procedural history. This would not ordinarily elicit a response. Petitioner has also, however, for the first time, coupled his constitutional claim with a broad-gauged attack on the fairness of the proceedings which led to the finding that he was the father of Ms. DeShazer's child. An account of the filiation procedures in this case is therefore compelled. The following procedural history demonstrates that petitioner was afforded substantial

procedural leniency precisely because he was uncounseled.

On January 29, 1980 the Petition in Equity to Establish Paternity was filed alleging petitioner to be the father of Christopher DeShazer. A hearing was held on February 29, 1980 at which petitioner denied paternity. Petitioner also stated that an attorney had agreed to represent him. He was informed of his right to secure comparative blood testing, his right to trial by jury, and his right to be represented by an attorney.[1]

On March 11, 1980, petitioner was deposed. He was uncounseled at the deposition. Also on March 11, petitioner was sent a letter which informed him that pursuant to ORS 109.250 any party may request blood tests. A subsequent letter sent to him on June 17, 1980 informed him, *inter alia*, that,

> "You may request blood tests. The results of the tests may be used to prove or disprove that you are the father of the child. These tests are expensive and you will have to bear the costs of the tests. The state, however, will reimburse you if you are found not to be the father."

On August 11, 1980 petitioner was served with Requests for Admission pursuant to ORCP 45, a procedural rule similar to FRCP 36. Among other things, petitioner was asked to admit that he and Ms. DeShazer had sexual intercourse during the

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[1]This is not to imply, of course, that petitioner was informed that he had a right to appointed counsel; merely that he had the right to be represented.

months of August, September, and October of 1978 and that he and Ms. DeShazer had a steady social and sexual relationship from September, 1977 to December, 1978. The Request states, in capital letters at the outset: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS." Petitioner failed to respond to the requests for admissions and subsequently failed to appear at call when the time and date of the dispositional hearing was established.

On January 15, 1981 a hearing was held and petitioner attended without counsel. Prior to the hearing the trial judge said, "What we will do is try the matter as a default proceeding and in the event he (petitioner) wishes to move to set the matter aside, he will have 30 days in which to do it." At one point during the hearing, petitioner was asked, "You stated you had sexual relations. Did you use any kind of prophylaxis?" He answered, "No. She said she was on the pill, but I guess she wasn't." The court recognized that petitioner effectively had admitted paternity. He termed the admission "a devastatingly conclusive indication of paternity." At the conclusion of the hearing, the court found petitioner to be the father of the child and announced:

> "In the event that Mr. Stoutt feels that he has a defense other than that of bare denial, the matter can be reheard if a lawyer on his behalf or he on his behalf files a verified answer denying paternity in the course of the period of 30 days from today, and thereupon this matter will be given expedition on the trial docket for a contested hearing at which time he may apply for a trial by jury."

This proviso was included in the judgment order.

On February 6, 1981, petitioner filed an affidavit of indigency and a motion for appointment of counsel. On March 2, 1981 petitioner appeared at a hearing on the motion and was represented by his present counsel, a cooperating attorney for the American Civil Liberties Union. He moved to stay proceedings and for the appointment of counsel. These motions, the only ones offered, were denied. The only error petitioner assigned on appeal was error in failing to appoint counsel.

In light of this procedural history, petitioner's claims that the Oregon Court of Appeals "disregarded obvious procedural errors" (Pet. at 23), which "denied Jeffrey Stoutt any meaningful opportunity to be heard in his own defense" (Pet. at 23), and "sanctioned an adjudication which was fundamentally unfair . . . one-sided and procedurally flawed" (Pet. at 23) are not supported by the record. The Court of Appeals ruled on the only claim counsel raised—the constitutionality of the failure to appoint counsel. No other claims reasonably could

have been raised because the trial court's extraordinary solicitude for petitioner's interests and the interests of fairness in general rendered those claims barren.

REASONS WHY THE WRIT SHOULD BE DENIED

The general approach to the inquiry whether a particular procedural safeguard is mandated by the Due Process Clause of the Fourteenth Amendment[2] is outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976):

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 334-335.

Two recent Supreme Court cases considering related issues have eased the analytic task of determining whether due process requires the state to pay for counsel for indigent defendants in filiation proceedings. *Little v. Streater*, 452 U.S. 1 (1981);

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[2]The Due Process Clause reads: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

In *Little v. Streater*, *supra*, this Court concluded that, under Connecticut's peculiar paternity procedure, indigent defendants were entitled to state-financed blood tests. The Court noted that when certain blood groupings are present, a blood test is absolutely reliable to exclude the paternity of a falsely accused putative father. *Little v. Streater*, *supra*, 452 U.S. at 6-8. The Court also relied on Joint AMA-ABA Guidelines for the assessment that the blood test provided "* * * a 91% cumulative probability of negating paternity for erroneously accused Negro men and 93% for white men." *Id.* at 8.

The Court observed that, "The nature of paternity proceedings in Connecticut also bears heavily on appellant's due process claim." *Id.* at 635. Of particular importance was the fact that, under Connecticut law, the mother's testimony that the putative father in fact fathered the child constitutes a prima facie case which cannot be rebutted solely by the testimony of the putative father:

> "Under Connecticut law, therefore, the defendant in a paternity suit is placed at a distinct disadvantage in that his testimony alone is insufficient to overcome the plaintiff's prima facie case. Among the most probative additional evidence the defendant might offer are the results of blood grouping tests, but if he is indigent, the State essentially denies him that relia-

ble scientific proof by requiring that he bear its cost. [citation omitted]. In substance, the State has created an adverse presumption regarding the defendant's testimony by elevating the weight to be accorded the mother's imputation of him. If the plaintiff has been 'constant' in her accusation of paternity, the defendant carries the burden of proof and faces severe penalties if he does not meet that burden and fails to comply with the judgment entered against him. Yet not only is the State inextricably involved in paternity litigation such as this and responsible for an imbalance between the parties, it in effect forecloses means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause." *Id.* at 12.

The Court then specifically addressed the *Mathews* factors. It first outlined the private interests at stake, holding that, "Just as the termination of such (familial) bonds demands procedural fairness [citing *Lassiter v. Department of Social Services, supra*], so too does their imposition." *Id.* at 637. It then stressed both the accuracy of the blood test definitively to exclude a high percentage of falsely accused putative fathers and the state's onerous evidentiary rule. The Court also stressed that, while the cost of a blood test in Connecticut had risen to $460.00, 75 percent of that cost is borne by the federal government pursuant to 42 U.S.C. § 655(1)(a). The Court concluded,

"Assessment of the *Mathews v. Eldridge* factors indicates that appellant did not receive the process he was constitutionally due. Without aid in obtaining blood test evidence in a paternity

case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks 'a meaningful opportunity to be heard.' *Boddie v. Connecticut, supra* at 377, 92 S. Ct. 780, 29 L. Ed.2d 113.

"* * * * *

"We hold that in these specific circumstances, the application of Conn. Gen. Stat. 46b-168 (1981) to deny appellant blood grouping tests because of his lack of financial resources violated the due process guarantee of the Fourteenth Amendment." *Id.* at 16-17.

In concluding that due process compels state-financed blood tests the Court placed substantial reliance on the Connecticut evidentiary rules which disable the putative father from demonstrating lack of paternity.[3] *Little v. Streater*, therefore may well be confined to its procedural facts. In any event, the putative father in the present case does not seek to have the state pay for a blood test, which is both inexpensive and highly probative. He seeks to have the state pay for the appointment of counsel.

In *Lassiter v. Department of Social Services, supra*, this Court addressed the claim that indigent defendants in parental rights termination proceedings are entitled, as a matter of due process, to

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[3]No such evidentiary burden exists in Oregon; and, in fact, the testimony of the parent or expectant parent is insufficient to establish paternity without corroborating evidence. ORS 109.155. Under these circumstances, it is highly questionable whether due process imposes a requirement that blood tests for Oregon indigents be provided by the state.

appointed counsel at state expense. *Lassiter* holds that there is a presumption *against* a right to appointed counsel in the absence of at least a potential deprivation of physical liberty, but that this presumption can be overcome:

> "If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak * * *."

Lassiter traces the constitutional history of the right to appointed counsel. That right, as the Court notes, never had been recognized in a case in which the litigant was not exposed to a potential loss of physical liberty. *Lassiter v. Department of Social Services, supra*, 452 U.S. at 25.

> "[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendment right to counsel in criminal cases, which triggers the right to appointed counsel * * *."

Lassiter holds that as the threat to a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.

Perhaps because of the "unique kind of deprivation" involved in termination of parental rights cases and the consequent "commanding" interest of the litigant, the Court in *Lassiter* stretched the historical limits of the right to appointed counsel by converting into a presumption the "pre-eminent generalization" that a litigant is only entitled to

appointed counsel when potential loss of personal liberty is at stake.

> "In sum, the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the court has considered the right to appointed counsel; and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured." *Id.* at 26-27.

Because no loss of liberty was threatened in *Lassiter*, the court measured the three *Mathews* factors against the presumption that there is no right to appointed counsel in the absence of a potential deprivation of physical liberty. In concluding that the presumption was not overcome, the Court did not "attempt to formulate a precise and detailed set of guidelines to be followed," *id.* at 652-653; rather, the Court assessed the specific facts of the case in denying appointed counsel for Ms. Lassiter.

Lassiter states that:

> "If, in a given case, the parent's interests were at their strongest, and the state's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel." *Id.* at 31.

The Court adopted the approach established in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) for assess-

ing the necessity for appointed counsel. *Gagnon* states that, "the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." 411 U.S. at 790.

The Oregon Court of Appeals' opinion in this case carefully weighed the petitioner's claim against the *Little/Lassiter* backdrop. The Court of Appeals concluded that, read most favorably to petitioner's position, *Lassiter* might apply. The Court of Appeals assumed the legitimacy of petitioner's claim under *Lassiter*, and held:

> "If anything, the facts and the issues here are even more clear-cut than those in *Lassiter*. We conclude that an attorney could have had little effect on the result in this proceeding and that defendant had no due process right to appointed counsel." *State ex rel Adult and Family Services v. Stoutt*, 57 Or. App. 303, 313, 644 P.2d 1132 (1982).

As the Oregon Court of Appeals found, if *Lassiter* were held to control in this case, there is little question on these facts that appellant was not entitled to appointed counsel. The issues at the paternity hearing were not complex; appellant essentially admitted paternity. Because the procedure and the factual issues presented were uncomplicated and because there was virtually no risk of error in the outcome, the Oregon court's holding that

appellant was not entitled to court-appointed counsel was well within the range of its discretion.

Respondent submits, however, that *Lassiter* does not control in the context of paternity cases, and the Oregon Court of Appeals gave more than necessary in analyzing petitioner's claim under it. In *Little*, this Court said that the interests of the private parties both in termination proceedings and paternity proceedings are entitled to due process protections. It did not say that they were entitled to the same protections. The extent and nature of procedural protections due in paternity cases, as in termination cases, must be determined by assessing the *Mathews* factors.

There are significant differences, both procedural and substantive, between the termination proceedings in *Lassiter* and the paternity proceedings in this case. Those differences suggest that a putative father's interest in acquiring a right to appointed counsel is insufficient to overcome a "presumption" that counsel should not be appointed.

The substantive private interests at stake in a paternity proceeding are markedly different from those at stake in a termination proceeding. In a termination proceeding, the state attempts to sever an existing parent-child relationship over the parent's objection. In a filiation proceeding, the state attempts to establish a parent-child relation-

ship solely for purposes of establishing a support obligation. A paternity proceeding does not establish a "familial bond," Supreme Court dicta to the contrary notwithstanding.[4] Whether or not any "familial bond" is developed depends entirely on the private desires of the parties. In contrast, the termination proceeding terminates a familial relation which traditionally has been granted protection by the United States Supreme Court. As *Lassiter* observes:

> "This Court's decisions have by now made plain beyond the need for multiple citation that a

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[4]In *Little*, this Court stated:

> "This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. Just as the termination of such bonds demands procedural fairness, so too does their imposition." [citation omitted]. *Little v. Streater, supra* 452 U.S. at 13.

In the Court of Appeals, petitioner argued that this meant that filiation proceedings deserve *the same* constitutional scrutiny as that required in parental rights termination cases. The Court of Appeals apparently agreed. In footnote 4, the court states:

> "Were it not for the Supreme Court's contrary determination, we perhaps would agree with petitioner's contention that a putative father's interest in a paternity decision is not nearly as substantial as a parent's interest in a termination decision. Although the Supreme Court characterizes the decision in a contested paternity case as establishing a parent-child relationship, that relationship is almost certain to remain an unwanted one on the part of the father and one which offers no nurturing to the child. Conversely, a parent who resists termination of his or her rights in a child has an interest which goes well beyond that of a putative father who seeks to avoid the adjudication of and responsibility for his parental status." *State ex rel Adult and Family Services v. Stoutt, supra*, 57 Or. App. at 308.

Both petitioner and the Court of Appeals have, we suspect, misinterpreted *Little* in this respect. The opinion in *Little* merely indicates that the Due Process Clause applies to filiation proceedings and guarantees procedural fairness, as it does in termination cases. It does not say that a defendant's interest in filiation proceedings, which is purely financial, is of the same order as the defendant's interest in termination cases, which finally sever familial bonds.

> parent's desire for the right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' *Stanley v. Illinois*, 404 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed.2d 551. Here the State has sought not simply to infringe upon the interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation. [citation omitted]. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." *Lassiter v. Department of Social Services, supra*, 68 L. Ed.2d at 649-650.

The interests of parents in maintaining a parent-child relationship are significantly more important than the interest of a putative father in avoiding that relationship. A termination proceeding essentially ends any possibility that the parent ever will have a continuing contact with the child. It finally severs any family relationship between the parent and the child. A paternity proceeding, on the other hand, merely establishes the legal parent-child relationship, a fact that is, by itself, without familial substance. The putative father's interest in a paternity proceeding is exclusively pecuniary.[5]

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[5]Petitioner makes much of the fact that if he is ordered to pay child support and if he neglects "without lawful excuse" to meet his support obligation, he could be criminally prosecuted for nonsupport, a Class C felony. ORS 163.555. As the Court of Appeals' opinion notes:

> "A father of a child born out of wedlock is subject to judicial proceedings which can result in his being required to pay the same basic costs as fathers of legitimate children. If he fails to abide by that requirement, he confronts essentially the same ancillary risks as those which confront any parent who fails to support a child, *see*, ORS 163.555, and any person who violates the order of a court in a civil proceeding." *State ex rel Adult and Family Services v. Stoutt, supra*, 57 Or. App. at 314.

Just as the individual interests in a paternity case are materially different from the individual interests in a termination case, the basic issue in a paternity proceeding and the procedures for resolving that issue, unlike in termination proceedings, are simple in the extreme. Financial support aside, ORS 109.155(4), the only issue in a paternity case is whether the defendant fathered the child. That determination must be made, following a hearing, by a preponderance of the evidence. In Oregon, the mother's testimony is, by itself, insufficient to establish the operative fact. *See* ORS 109.155. Generally, the only probative evidence on the issue will be blood tests and testimony since "[t]here are seldom accurate or reliable eye witnesses [because] the sexual activities usually take place in intimate and private surroundings, and the self-serving testimony of a party is of questionable reliability." *Little v. Streater*, *supra*, 68 L. Ed.2d at 634.

Given the relative simplicity of the issues involved, the "probable value, if any, of additional * * * procedural safeguards," *Mathews v. Eldridge*, *supra*, 424 U.S. at 334, is slight. Court-appointed counsel would not, in the vast majority of cases, improve the accuracy of the outcome. This fact is peculiarly evident here. There is little doubt about the accuracy of the outcome; petitioner basically

admitted paternity in open court. Given the nearly conclusive probability that the outcome in this case was in fact accurate, petitioner can hardly argue that the presence of counsel, whose task it would have been to obtain the opposite result, would have promoted accuracy. Counsel may have avoided an admission by petitioner, but that would have made the possibility of an erroneous outcome more, not less, likely.

The relatively simple factual inquiry in paternity cases stands in sharp contrast to the notoriously difficult inquiry in termination cases; cases in which expert testimony from psychiatrists, social workers, and others is employed to solve the predictive and elusive riddle of the best interests of the child. As the Supreme Court in *Lassiter* notes:

> "Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to refute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty with life, and who are, at the hearing, thrust into a distressing and disorienting situation." *Lassiter v. Dept. of Social Services, supra*, 452 U.S. at 30.

Both the substantive inquiry and the procedures for approaching it are more sophisticated and complex in termination proceedings than in paternity proceedings.

The state's interest in avoiding both the expense of appointed counsel and the cost of the lengthened proceedings which the presence of counsel inevitably

will entail is, as the *Lassiter* decision finds, "legitimate." Those costs are substantial, as the costs associated with appointment of counsel in individual criminal cases would suggest. They are certainly more substantial than the cost of the blood tests considered in *Little*, and, if this Court's statistics in *Little* are correct, they are significantly less conducive to accuracy. As compared to proceedings which threaten one's personal liberty, petitioner's fiscal interest in paternity proceedings is comparatively minor. However, if that interest is sufficiently important to require protection either through court-appointed counsel or through state-financed blood tests, the latter rather than the former undoubtedly should be preferred.

CONCLUSION

The Supreme Court, in *Lassiter*, modified a long-standing and principled tradition when it recognized the possible existence of a right to appointed counsel in a case in which the deprivation of physical liberty was not threatened. It recognized such a possibility, not because every interest which may be associated with the family-sex cluster is entitled to it, but because of the "unique kind of deprivation" which occurs in termination cases and because of the potential complexity of those proceedings. No similar factors operate in paternity cases. The Oregon Court of Appeals correctly concluded

that petitioner was not entitled to court-appointed counsel in this proceeding. The petition for writ of certiorari should be denied.

Respectfully submitted,

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